ISSUED OCTOBER 6, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS

BOARD OF THE STATE OF CALIFORNIA

SHARON L. ADCOCK, et al. Appellants/Protestants, v. MICHAEL B. YANDELL dba Harvey Washbangers 4005 Highland Avenue Manhattan Beach, CA 90266 Respondent/Applicant, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7221 File: 41-333832 Reg: 98042445 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: August 12, 1999 Los Angeles, CA

Sharon L. Adock, J. Clark Aristei, Susan Trimmer Bowes, Roberta Brown, John A. Brown, Barbara Jane Cochran, Burke B. Cochran, Jr., Donna L. Cotton, David M. Gurewitz, Shirely C. McReynolds, Dorothy O'Neil, Donna Posin, David M. Roney, III, Marcy Roney, Floyd L. Ruhl, Lulu Belle Ruhl, Robert W. Stuppi, John Wilson, Margaret L. Wise, and William R. Wise (protestants), appeal from a decision

of the Department of Alcoholic Beverage Control[1] which overruled their protests against the issuance of an on-sale beer and wine public eating place license to Michael B. Yandell, doing business as Harvey Washbangers (applicant).

Appearances on appeal include protestants as listed above, appearing through their counsel, Joshua Kaplan; applicant Michael B. Yandell, appearing through his counsel Ralph Barat Saltsman and Stephen Warren Solomon; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Applicant petitioned for an on-sale beer and wine public eating place license (a restaurant with accompanying beer and wine availability). The Department following its investigation of the petition for the license, denied the issuance of the license on the grounds that there were approximately 50 residents within 100 feet of the proposed premises. During the investigative process, approximately 104 persons filed protests against the issuance of the license.

An administrative hearing was held on May 4, 5, and 7, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the issues as set forth in the subsequent decision of the Department.

The proposed operation is a novel type restaurant for California, being a

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[1]The decision of the Department, dated August 13, 1998, is set forth in the appendix.

combination of a coffee shop with a full-scale kitchen apparently serving meals at all times of the day and evening, a coin-operated laundromat and dry cleaning service (with off-site processing), along with a coin-operated computer service area [Finding III].

The premises is located in a densely populated beach area of Manhattan Beach, a city in Southern California. Protestants' Exhibit IV, A-Q, shows the premises under construction, and graphically the dense traffic conditions.

Subsequent to the hearing, the Department issued its decision which determined that the license should be issued subject to conditions previously imposed and as modified by the decision.

Protestants, thereafter, filed a timely notice of appeal. In their appeal, protestants raise the following issues: (1) the decision and the findings are not supported by substantial evidence, in that applicant failed to prove that his operation would not interfere with residential quiet enjoyment; (2) Business and Professions Code §24210 is unconstitutional; and (3) protestants were precluded from relevant cross examination.

DISCUSSION

I

Protestants contend that the decision and the findings are not supported by substantial evidence, in that applicant failed to prove that his operation would not interfere with residential quiet enjoyment.

On the question of whether a license should be issued, it is the Department

which is authorized by the California Constitution to exercise its discretion whether to grant or deny an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting, or the denial, of such license would be contrary to public welfare or morals.

The court in Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App.2d 489 [30 Cal.Rptr. 219, 222], enumerated several considerations the Department may consider in determining if a license would endanger welfare or morals: "the integrity of the applicant as shown by his previous business experience; the kind of business to be conducted on the licensed premises; the probable manner in which it will be conducted; the type of guests who will be its patrons and the probability that their consumption of alcoholic beverages will be moderate; the nature of the protests made ...."

The Department has determined that the issuance of the license will not interfere with nearby residential quiet enjoyment (Finding XV, and Determination of Issues 1 and 2). The Department also concluded that parking and law enforcement problems would not be adversely affected by the issuance of the license (Determination of Issues 3-8).

Review by the Appeals Board is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the

Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

"Substantial evidence" as the criteria used by the Appeals Board in its review, is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

However, the impact on nearby residents of an alcoholic beverage license may be sufficiently detrimental that close scrutiny of the issuance is demanded. The United States Supreme Court has declared its concern for the tranquility of

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[2]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

residential areas and the need to be free from disturbances. (Carey v. Brown (1980) 447 U.S. 455, 470-471 [100 S.Ct. 2286, 2295-2296, 65 L.Ed.2d 263].) Other "locational" cases involving protection of residential neighborhoods include Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [96 S.Ct. 2440, 49 L.Ed.2d 310], and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

In the "residential quiet enjoyment"/"law enforcement problem" case of Kirby v. Alcoholic Beverage Control Appeals Board & Schaeffer (1972) 7 Cal.3d 433, 441 [102 Cal.Rptr. 857], the Supreme Court said "...the department's role in evaluating an application...is to assure that public welfare and morals are preserved from probable impairment in the future...[and] in appraising the likelihood of future harm...the department must be guided to a large extent by past experience and the opinions of experts." The case was not a rule 61.4 case (the closest residence was about 150 feet away). The court took note of substantial evidence on both sides of the issue and concluded that the expert witness testimony of the county sheriff was sufficient to support the Department's crucial findings.[3]

The Alcoholic Beverage Control Act sets forth the proposition that the Department may make and prescribe reasonable rules as are necessary to carry out the purposes of the Act. (Business and Professions Code §25750.) One of the rules promulgated by the Department is 4 California Code of Regulations, §61.4

[3]Concerning the question of balancing the issues, the Kirby case based its decision on the fact that since there was substantial evidence on both sides, then the decision of the Department must be sustained. This is similar the current case.

(Rule 61.4), which reads in pertinent part:

> "No original issuance of a retail license ... shall be approved for premises at which ... the following [condition] exist[s]: ...(a) The premises are located within 100 feet of a residence ...."

Quiet enjoyment of their property by the citizenry appears to command the focused attention of the state. The rule above quoted mandates that no license is to be issued where a residence is located within 100 feet of the proposed licensed premises.

The Board over the years has visited the extremely restrictive requirements of Rule 61.4. The Board in Davidson v. Night Town, Inc. (1992) AB-6154, stated: "In rule 61.4, the department prohibits itself, as it were, from issuing a retail license if a residence is within 100 feet of a proposed premises ...."

The Board in Ahn v. Notricia (1993) AB-6281, stated: "This rule [Rule 61.4] concerns prospective interference or noninterference with nearby residents' quiet enjoyment of their property ... Apparently rule 61.4 is based on an implied presumption that a retail alcoholic operation in close proximity to a residence will more likely than not disturb residential quiet enjoyment."

In the case of Graham (1998) AB-6936, the Board cited many cases concerning quiet enjoyment and its supreme importance to the extent "that rule 61.4 is nearly absolute."[4]

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[4]Citing Kassab (1997) AB-6688; Hyun v. Vanco Trading, Inc. (1997) AB-6620; Hennessey's Tavern, Inc. (1997) AB-6605; Lopez & Moss (1996) AB-6578; Alsoul (1996) AB-6543, a matter where the Appeals Board raised the rule on its own motion; J.D.B., Inc. (1996) AB-6512; Park (1995) AB-6495; Esparza (1995) AB-6483; and Saing Investments, Inc. (1995) AB-6461.

Notwithstanding the restrictive wording of the rule, the rule sets forth a procedure whereby the Department may issue a license, that is, exercise its discretion, even though the rule is applicable: "Notwithstanding the provisions of this rule, the department may issue an original retail license ... where the applicant establishes[5] that the operation of the business would not interfere with the quiet enjoyment of the [their] property by residents."

Applicant has consented to the imposition of 26 conditions which were apparently crafted for the purpose of controlling the operation in a manner which would protect residential quiet enjoyment. These conditions limit hours of sales and consumption of alcoholic beverages, and control sound audibility. Live entertainment, dancing, private parties, or coin operated games, are prohibited. The conditions also address litter, parking, patron occupancy limits, off-sale privileges, and demand that the sale of alcoholic beverages only be incidental to the sale of food, with the setting of a ratio standard of alcoholic beverage sales to food sales.

The authority of the Department to impose conditions on a license is set forth in Business and Professions Code §23800. The test of reasonableness as set forth in §23800, subdivision (a), is that "...if grounds exist for the denial of an application...and if the department finds that those grounds [the problem presented] may be removed by the imposition of those conditions..." the Department may

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[5]Webster's Third New International Dictionary, 1986, page 778, defines the word "establish," in the archaic form, as "to prove or make acceptable beyond a reasonable doubt," apparently meaning to prove.

grant the license subject to those conditions. Section 23801 states that the conditions "...may cover any matter...which will protect the public welfare and morals...."

We therefore view the word "reasonable" as set forth in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link,"[6] in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

With these somewhat lengthy, but essential criteria for review, the duty of the Appeals Board is to determine if the finding of the Department's decision, that issuance will not be detrimental to quiet enjoyment, is supported by substantial evidence.

Protestants' Exhibit IV, A-Q, are eloquent photos of the closely cramped housing commonly seen in beach areas. The traffic flow appears excessive (presumably at different times of the day) through the streets shown (this traffic flow and the resultant parking problems, are burdensome as set forth in the testimony of protestants -- 5/4 RT 114-116, 135-138, 149-151, 154-157, 165-171; and 5/5 RT 9, 27, 48-49, 52, 63, 67-68, 81-82, and 122-124).

While the operation is being placed into such a congested area, such congestion and high concentration of people is a boon to applicant's combined operation.

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[6]See Webster's Third New International Dictionary, 1986, page 1524.

The main concerns of protestants against the issuance of the license appear to arise from the operation of nearby licensed premises. There are seven on-sale restaurant-type premises, one beer and wine license and six general licenses (authorized to sell beer, wine, and spirits). Complaints concern the discard of empty bottles and cans of beer, public urination, noise, and the presence of intoxicated persons in the streets [RT 5/4 - 10-12, 20-21, 130, 157, 165-167, 178-180). The record is sparse concerning why these restaurants are creating such havoc in the area. We do not know if these other premises are conditioned adequately, have off-sale privileges, or have activities which would tend to engender noise and drunkenness. (See Finding XI). While restaurants occasionally create objectionable conditions for nearby residents, such appears to the Board from past experience, to be exceptions rather than the rule. A groundswell of community concern should be directed at the Department's enforcement, and local police services. The problems faced by protestants speak of insufficient enforcement of the laws, rules and policies of the Department.

The improper if not illegal operations, if such, of these licensed premises are a factor for our consideration. Notwithstanding the record of community harassment by possible improper controls by the licensed premises concerned, and possible lack of control by law enforcement, the question is still whether this applied-for license will contribute to the problems enumerated.

Applicant's premises is a specialty operation, with occupancy in the café-restaurant section set at 35 occupants (seat availability). Also, the entire operation

contemplates a coin-operated laundromat, dry cleaning services, and a coin-operated computer facility. But with a focus on the café-restaurant portion, parking problems according to the decision are adequately considered in favor of issuance [Finding IX and X]. As the decision sets forth in Finding XI, it is unlikely the premises' operation will attract clientele such as local licensed late night operations appear to attract. We cannot say, after a review of the record, that the Department has abused its discretion in so finding, that the licensing of the premises will not interfere with nearby residents.

We conclude there is substantial evidence on both sides of the issues presented, therefore, the Board must affirm the Department's decision.

II

Protestants contend that Business and Professions Code §24210 is unconstitutional.

The Appeals Board is precluded by the California Constitution, article 3.5, from declaring any statute unconstitutional or unenforceable. Therefore, the Appeals Board declines to consider this contention.

III

Protestants contend that they were precluded from relevant cross examination. We conclude that the denial of the scope of the questioning was properly within the discretion afforded the Administrative Law Judge (ALJ).

The relevant examination portion was as follows:

"BY MR. GUREWITZ [for protestants]: Do you know what your fixed

expenses are for your business on a monthly basis?

MR. SOLOMON: I'm going to object to this as being irrelevant. What is the relevance of the expenses?

THE COURT: Sustained.

MR. GUREWITZ: Well, your Honor ---

THE COURT: Counsel, move on. Next question.

MR. GUREWITZ: I can't make an offer of proof?

THE COURT: It is not relevant, Counsel.

MR. GUREWITZ: Your Honor, they have a license that they are applying for with restrictions on the amount of alcohol they are going to sell. And I think their profits and their expenses are relevant because I think it will show that they cannot make a goal [profit?] with only 40 percent maximum alcohol sales of their business. [¶] I think it's relevant to show that they are going to have to turn into a bar. And that (sic) that's going to be the primary business." [RT 5/7, 129-130].

The ALJ has wide discretion in limiting examination of a witness, and controlling the orderly flow of testimony and questions upon the issue at hand.

Attorney Gurewitz (counsel) attempted to expand the questioning area into the expenses attributable to the business, apparently the total business operation. Counsel on page 33 of the May 7 transcript, was examining Mr. White who was the designated general manager of the operation and who had managed a Harvey Washbanger's in Tennessee which apparently was set up as projected for applicant's operation [5/7 -- p.10]. Counsel sought to ascertain the salary of Mr. White which was objected to and the objection was sustained by the ALJ. Counsel stated that he was entitled to determine all of the fixed expenses of the operation

to determine if the operation could meet the 40% limitation of alcoholic beverage sales [5/7 -- 33]. Condition 13 (Finding I) states that the quarterly gross sales of alcohol will not exceed the quarterly gross sales of food in a 40%/60% ratio.

Counsel sought the expenses for the operation. The question was not qualified as to estimates of food or beverage sales. It appears that counsel was trying to ascertain all the expenses of the business, to which he was not entitled and clearly irrelevant. Whether or not the business can generate at least 60% food sales and the other 40% alcoholic beverage sales is a matter of fact to be determined in the future. Counsel's cross examination was overly broad and the ALJ had the right to control that examination in the manner the ALJ did.

ORDER

The decision of the Department is affirmed.[7]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[7]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.